United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Affidavit

76-4204

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4204

TIM LOK,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC* AND ADDENDUM

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

TIM LOK,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- -x

Docket No. 76-4204

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Preliminary Statement

On February 12, 1953 in Matter of S, 5 I & N Dec. 116 (BIA 1953), the Board of Immigration Appeals ("Board") first confronted the question of how to interpret and apply the recently enacted provisions of Section 212(c) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(c).* After examining the legislative history of this section and comparing its language with that of its statutory precursor, the Seventh Proviso,** the Board concluded that it was Congress's intention to limit Section 212(c)

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* Section 212(c) of the Act provides in part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

** The predecessor of Section 212(c) was the Seventh Proviso to Section 3 of the Immigration Act of 1917. It read: . . . aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General . . . .

to only those aliens who, at the time of their application, were returning to a lawful domicile of seven consecutive years following their lawful admission to permanent residence. This interpretation has remained unchallenged for nearly a quarter of a century and has been applied consistently to similar situations arising under Section 212(c) of the Act. Most recently it was applied to the petitioner in this action in Matter of Lok, I.D. No. 2509 (BIA 1976). On January 4, 1977 a panel of this Court reversed the Board's longstanding interpretation of Section 212(c) of the Act and found that an alien in the United States in other than lawful permanent resident status could have a lawful domicile in this country. After a review of the Board's decision in Matter of S and the bases of that decision, the respondent respectfully petitions this Court for a rehearing and suggests the appropriateness of a rehearing en banc pursuant to Rules 35b and 40 of the Federal Rules of Appellate Procedure.

REASONS FOR THIS PETITION

The respondent petitions for rehearing and suggests rehearing en banc due to the exceptional importance of the issues raised by the panel's decision.

If allowed to stand, the panel's opinion could have major and far reaching consequences on the administration of the Immigration and Nationality Act. By upsetting the longstanding interpretation of that Act by the Board of Immigration Appeals in Matter of S, the panel's decision could open the door to a large number of claims by aliens that time spent in the United States in temporary nonimmigrant or parolee status, or even in an illegal status, may

count towards eligibility for this extraordinary form of relief. This, in turn, could expand the eligible beneficiaries for 212(c) relief far beyond those whom Congress could possibly have contemplated and could interject such uncertainty into this previously settled area of immigration law that it will encourage those who seek to litigate solely for delay, thereby having a significant adverse impact on an already overburdened administrative and judicial system. See, Acevedo v. I.N.S., 538 F.2d 918 (2d Cir. 1976).

In addition we submit that the panel's decision also failed to accord sufficient weight to the overall statutory structure of the Act and to the law as it existed when Matter of S was decided, which, when combined with the evident Congressional intent in enacting Section 212(c) to curtail the discretionary authority which existed under that section's predecessor, reveal the Board's decision in Matter of S not only to be reasonable but also to be the only reasonable construction which could have been placed on Section 212(c)'s provisions at the time it was enacted. Moreover, contrary to the panel's opinion, the Board has not equated the seemingly dissimilar statutory phrases "lawfully admitted for permanent residence" and "lawful unrelinquished domicile" but has construed those phrases to provide for the granting of Section 212(c) relief in a manner consistent with the orderly administration of this provision, the Act as a whole, and the intent of Congress.

Finally, should this court and panel refuse to grant respondent a rehearing on this action, nevertheless the panel should redact its initial opinion so as to excise those portions which are

unnecessary to the conclusion but which could inhibit the Board's ability to consider these issues, if presented, in an unfettered manner in the first instance, N.L.R.B. v. Columbia University, 541 F.2d 922, 930-32 (2d Cir. 1976), or could have a substantial adverse impact on the respondent's ability to administer the immigration laws. Sloan v. S.E.C., F.2d (2d Cir. November 18, 1976), reh. denied, Slip Opinion, page 1519 (2d Cir., December 27, 1976).

ARGUMENT

POINT I

THE STATUTORY FRAMEWORK OF THE ACT COMBINED WITH THE STATE OF THE LAW AND CONGRESS'S INTENT AT THE TIME SECTION 212(c) WAS ENACTED, DEMONSTRATE THAT THE BOARD'S DECISION IN MATTER OF S WAS THE ONLY REASONABLE CONSTRUCTION WHICH COULD BE APPLIED TO ITS PROVISIONS

In its decision in this action the panel examined the pertinent portions of two Congressional reports and concluded that the language in those reports, if compared to that eventually incorporated in Section 212(c) of the Act, did not justify the Board of Immigration Appeals' decisions in Matter of S and this case. In reaching this conclusion the Court overlooked the statutory framework within which Section 212(c) was placed, the state of the law as it existed at the time Section 212(c) was enacted, and the Congress's clear intent in replacing the Seventh Proviso with Section 212(c) to restrict the discretionary authority that had been exercised under the predecessor statute. A brief examination of these factors will demonstrate the propriety of the Board's original decision in Matter of S.

A. Eligibility For Section 212(c) Relief Requires That The Alien Have A Lawful Immigration Status And Be A Domiciliary Of The United States.

The focus of the Court's decision in this case was the statutory phrase "lawful unrelinquished domicile" contained in Section 212(c). The word "domicile" in that phrase refers to the legal concept of being a domiciliary of the United States which requires an alien to be physically present here and to have the intention of making the United States his home for the indefinite future. Gilbert v. David, 235 U.S. 561, 569-70 (1915); Matter of Garcia-Quintero, Interim Decision 2366 (BIA 1975) (Reproduced in the Addendum). Furthermore, the statutory requirement that the domicile be "lawful" was clearly intended by Congress as a means of limiting the relief to aliens who were lawfully entitled to establish domicile in the United States in accordance with the immigration laws. Indeed, the legislative history relating to the enactment of Section 212(c) reflects Congressional disapproval of the administrative decisions interpreting that Section's predecessor which had permitted aliens illegally in the United States to gain the benefits of that earlier statute. See S. Rep. No. 1515, 81st Cong., 2d. Sess. 382-84 (1950). The prior law had merely required the alien to be returning to an "unrelinquished domicile". The new law, Section 212(c), required him to be returning to a "lawful unrelinquished domicile", and thus precluded this form of relief for any alien whose immigration status was not "lawful".

B. The Dual Statutory Requirements Of Lawful Status And Domicile Effectively Limited Section 212(c) To Lawful Permanent Residents.

Under current law, aliens who are permitted to enter the United States do so either as immigrants (aliens lawfully admitted

for permanent residence), as nonimmigrants within the terms of Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15), as conditional entrants under Section 203(a)(7) of the Act, 8 U.S.C. §1153(a)(7), or as refugees or other parolees. At the time of the enactment of Section 212(c) in 1952 there was no provision in the statute relating to conditional entrants.* Therefore, contrary to the Court's decision, Congress could not have meant to benefit conditional entrants by its use of the phrase "lawful unrelinquished domicile" in Section 212(c). Similarly, the practice of admitting large numbers of refugees in parole status with an eye towards eventual regularizations of their status had not come into being, and could not have been contemplated by Congress inenacting Section 212(c).** See Gordon and Rosenfield, Immigration Law and Procedure, Sections 2.27h and 6.7a.

Aliens "paroled" into the United States under Section 212(d)(5) of the Act, 8 U.S.C. §1182(d)(5), with the exception of refugee parolees, are here for a temporary purpose only and have no legal immigration status. They certainly could not establish a "lawful" domicile consistent with the immigration laws.

This leaves only one category of aliens who, at the time of the Board's decision in Matter of S, could have had a lawful status here without being lawfully admitted for permanent residence, namely, nonimmigrants. However, almost every nonimmigrant category

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* The provision covering conditional entrants was added by the Act of October 3, 1965, 79 Stat. 911, 913.

** Aliens who qualified as "refugees" in the early 1950's were admitted to the United States as lawful permanent residents under both the Displaced Persons Act of 1948 (62 Stat. 1009) and the Refugee Relief Act of 1953 (67 Stat. 400) and would therefore have been treated as all other lawful permanent residents.

of Section 101(a)(15) requires the nonimmigrant alien to maintain a residence in a foreign country which he has no intention of abandoning or to be coming here for a temporary purpose, or both. In order to establish a domicile in the United States such a nonimmigrant would have to abandon his temporary purpose or his intention of returning to his foreign residence. He would then no longer qualify as a nonimmigrant, and his United States domicile could not be considered "lawful" under the immigration laws.

The only nonimmigrants who could conceivably establish a domicile in the United States which would not be inconsistent with lawful nonimmigrant status are diplomats (Section 101(a)(15)(A)), foreign government representatives (Section 101(a)(15)(G)), treaty traders (Section 101(a)(15)(E)), and fiancees (Section 101(a)(15)(K)). "Fiancees", however, did not exist in 1952. If Congress had intended the language of Section 212(c) to benefit this very limited number of "A", "G", and "E" nonimmigrants who might, under some theory, legally be domiciled in the United States, it most certainly would have expressed that intention in the legislative history.

The conclusion is inescapable that at the time Matter of S was decided only one meaningful group of aliens could simultaneously have lawful status and domicile in the United States, namely, lawful permanent residents. Therefore, the Board's decisions in Matter of S and this case fully comport with what must have been the Congressional thinking and the only readily understood meaning that could have been given to the language of Section 212(c).

C. The Legislative History Of Section 212(c) Supports the Board's Ruling.

In its decision, this Court stated that Section 212(c) "was enacted by Congress to provide the Attorney General the flexibility and discretion to permit worthy aliens to continue their relationships with family members in the United States . . . ." Opinion, page 4. This statement misinterprets the history behind Section 212(c). In reality, the enactment of Section 212(c) was a drastic intentional restriction on the rather generous exercise of administrative discretion under its predecessor statute, the Seventh Proviso to the Immigration Act of 1917.*

The legislative history of the 1952 Act specifically stated that "any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations." H.R. Rep. No. 1365, 82nd Cong., 2d. Sess. 51 (1952) (emphasis added).**

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* This restrictive theme ran throughout the 1952 Act and was an important factor in President Truman's veto. H. Doc. 520, 82nd Cong., 2d. Sess., June 25, 1952.

** The legislative history presented here was not referred to by the Board in Matter of S and thus was not included in our brief to the panel. However in view of the panel's erroneous conclusion, it is essential to present more fully those aspects of this history which probably were so clear in the minds of the Board Members deciding Matter of S that they were considered superfluous to the written opinion. Paramount among these aspects, of course, is the absence of alien classes in 1952 (other than lawful permanent residents) who could have acquired a lawful domicile in this country without being admitted to permanent residence. Given the obvious difficulty at this time of reconstructing what must have been common knowledge in 1952, this case also supports the wisdom of the rule of statutory construction set forth in Udall v. Tallman, 380 U.S. 1, 16 (1964), which requires great deference to be granted to the contemporaneous interpretations of statutes made by the administrative agencies charged with their enfacement.

The Seventh Proviso, which was the precursor to Section 212(c), had been broadly interpreted by the administrative authorities. See, Matter of H, 1 I & N Dec. 166 (1942). This broad view of the Seventh Proviso was criticized by a Congressional study which asserted "that the proviso was intended to give discretionary power to the proper Government official to grant relief to aliens who were reentering the United States after temporary absence, who came in the front door, were inspected, lawfully admitted, established homes here, and remained seven years before they got into trouble". S. Rep. No. 1515, 81st Cong., 2d. Sess., 382 (1950) (emphasis added).

Congress at one point considered abolishing the Seventh Proviso because of the perceived adverse effects it was causing. S. Rep. No. 1515, 81st Cong., 2d. Sess. 383 (1950). However, a less drastic revision of the Seventh Proviso prevailed, with the Congressional study noting that:

> if the words "established after a lawful entry for permanent residence" were inserted in the seventh proviso to qualify the domicile of the alien it would effectively eliminate practically all the objectionable features, and at the same time the Attorney General would be left with sufficient discretionary authority to admit any lawful resident aliens returning from a temporary visit abroad to a lawful domicile of seven consecutive years.* (emphasis added.)

Not surprisingly, language strikingly similar to the underscored appeared in the Subcommittee's recommendation that "the proviso

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* S. Rep. No. 1515, 81st Cong., 2d. Sess. 384 (1950).

should be limited to aliens who have the status of lawful permanent residents who are returning to a lawful domicile of seven consecutive years after a temporary absence abroad". (S. Rep. No. 1515, 81st Cong., 2d. Sess. at 384), and in the earliest versions of what was to become the Immigration and Nationality Act (S. 3455, 81st Cong., 2d. Sess., 1950; S. 716, 82nd Cong., 1st Sess., 1951), as well as in the final version of the Act itself. Given the common understanding that only lawful permanent residents could achieve a lawful domicile in the United States, Congress likely believed that the chosen language achieved the same result as would have been achieved by insertion of the language "established after a lawful entry for permanent residence".

The panel took the view that the final wording of Section 212(c) when read against the legislative history indicated a considered decision by Congress not to require the seven years lawful unrelinquished domicile to be established after a lawful admission for permanent residence. Opinion, page 8. However, the fact that Congress did not even discuss the reasons for choosing the eventual language of the statute suggests that Congress attached no legal significance to the variation in wording between the actual terms used and the proposed phrase which this Court deemed Congress to have "rejected". In fact, given the obviously restrictive intent of Congress and the common understanding of who could establish a lawful domicile under the then immigration laws, it is virtually inconceivable that Congress could have intended anyone other than a lawful permanent resident to achieve a "lawful unrelinquished domicile". Consequently, the Board's interpretation is undoubtedly what Congress intended.

In this regard the panel's decision not only ignores this intent but also the cardinal rules of statutory construction which require the Board's decision in Matter of Lok to be affirmed if it was "reasonable and not contrary to the discernable intent of Congress", Nazareno v. Attorney General, 512 F.2d 936, 940 (D.C. Cir.), cert. denied, 423 U.S. 832 (1975), and represented the contemporaneous interpretation of a statute by persons charged with establishing rules for the enforcement of that law. Udall v. Tallman, supra; Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961). Finally, the fact that Congress has amended the Immigration and Nationality Act on several occasions since 1953, but has never indicated any dissatisfaction with the Board's longstanding interpretation adds additional weight to that interpretation. See Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

D. The Board Had Not Equated The Term "Lawful Unrelinquished Domicile" With The Term "Lawfully Admitted For Permanent Residence".

The panel's decision also reflects an unwarranted concern that the Board's decision equated the statutorily defined term "lawfully admitted for permanent residence" with the undefined term "lawful unrelinquished domicile". Opinion, page 6. That, however, is not the case. In Matter of Garcia-Quintero, supra, the Board found that an alien who had been a lawful permanent resident for thirteen years was precluded from receiving Section 212(c) relief because the alien was not domiciled in the United States. The Board has thus recognized that the "unrelinquished domicile" requirement of the statute has a meaning apart from its interplay

with the word "lawful", and has interpreted that language in a manner consistent with the plain meaning of these words. In this regard it is clear that the Board has not equated the phrase "lawfully admitted for permanent residence" with the phrase "lawful unrelinquished domicile" but has merely held that a lawful domicile can only be established by an alien lawfully admitted for permanent residence.

POINT II

THE COURT'S JANUARY 4, 1977 DECISION SHOULD BE REVISED TO ELIMINATE PORTIONS WHICH ARE UNNECESSARY TO, AND HAVE NO CONSTITUENT PART IN, THE HOLDING OF THE CASE

Section 2 Clause 1 of the United States Constitution limits the jurisdiction of federal courts to actual "cases and controversies" and precludes the courts from issuing advisory "opinions which cannot affect the rights of the litigants in the case before it. St. Pierre v. United States, 319 U.S. 41, 42...(1943)". Wirte v. Local Unions 410, 410A, 410B & 410C, Int. U. of Op. Eng., 366 F.2d 438, 442 (2d Cir. 1966). Implicit in this constitutional requirement is the corollary which mandates federal courts to decide cases on the narrowest legal ground available. Korioth v. Briscoe, 523 F.2d 1271, 1275 (5th Cir. 1975), and to avoid conclusions which have no constituent part in, or are unnecessary to, the holding of the case. Sloan v. S.E.C., supra, at 1520.

In its opinion in this case the panel makes three statements which are clearly unnecessary to its conclusion but which could interject needless uncertainty into this heretofore settled

area of the law and thereby subject the respondent's already overburdened administrative system to countless numbers of claims by aliens made solely for the purpose of delay. Thus at page 6 of its opinion the panel declares ". . . it is possible for aliens to possess a lawful domicile in this country without being admitted to permanent residence, see, e.g., 8 U.S.C. §1101(a)(15)(J)(student)."* In light of our discussion in Point I, supra, we are confident that the panel will not adhere to this assertion. However, regardless of its validity, it is clear that the example used is incorrect since a prerequisite for the acquisition of such a nonimmigrant visa is a demonstration by the applicant that he is coming to the United States for a temporary period and is retaining a foreign residence to which he intends to return, precluding an assertion of a United States domicile by such a student.

Similarly, at page 9, the panel refers to what it terms petitioner's forceful argument that the Service's failure to enforce the 1965 deportation order "legalized" petitioner's stay. However this Court has recently rejected a similar contention in Chim Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975) as has the Third Circuit in Kan Kam Lim v. Rinaldi, 361 F.Supp. 177 (D.N.J. 1973), aff'd, 493 F.2d 1229 (3d Cir. 1974), cert. denied, 419 U.S. 874 (1974). Again, in the next sentence, the panel discusses whether the date on which petitioner married his United States citizen

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* Although the panel claims that the Government admitted this contention at oral argument, the Government merely admitted that an alien, such as a refugee admitted pursuant to Section 212(d)(5) of the Act, 8 U.S.C. §1182(d)(5), could establish a lawful residence, as distinguished from domicile, in this country without being admitted to permanent residence. See, Matter of Garcia-Quintero, supra.

wife should be considered the beginning of his seven years of "lawful" domicile despite clear case law to the contrary, Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971), and the Court's own conclusion that "these contentions are best left to initial determination by the Board of Immigration Appeals. See N.L.R.B. v. Columbia University, supra, at 930-32.

Since each of these portions of the panel's decision concerns the very issue remanded to the Board of Immigration Appeals for its "initial determination" namely, whether a lawful domicile could have been achieved by this petitioner prior to his admission to permanent residence, it is clear they are totally unnecessary to the conclusion reached. Accordingly, if the Court and panel do not see fit to grant rehearing in this action, we respectfully request the panel to redact its opinion and excise these unnecessary and potentially harmful statements from its final decision. Sloan v. S.E.C., supra at page 1520.

CONCLUSION

The petition for rehearing with a suggestion for rehearing en banc should be granted. Should rehearing and rehearing en banc be denied, the portions of the panel's initial opinion discussed in Point II of this memorandum should be excised from its final decision.

Dated: New York, New York

February 23, 1977

Respectfully submitted,

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ADDENDUM

MATTER OF GARCIA—QUINTERO

In Exclusion Proceedings

A-12682504

Decided by Board March 4, 1975

The applicant for admission into the United States was arrested for illegal possession of marijuana at the time he last applied for admission into the U.S. in 1972. Because of his conviction for that offense, he was found excludable under the provisions of section 212(a)(23) of the Immigration and Nationality Act. Although he was originally admitted as a lawful permanent resident in 1962, applicant actually lived in Mexico from 1967 to 1970, while working in the United States, his application for a waiver of excludability under section 212(c) of the Act was denied as he was statutorily not eligible for such relief.

EXCLUDABLE: Act of 1952 - Section 212(a)(23) [8 U.S.C. 1182(a)(23)] - Conviction, violation possession to distribute marijuana.

ON BEHALF OF APPLICANT: Martin L. Valdez, Esquire
1524 East Seventh Street
San Bernardino, California 92411

This is an appeal from a decision rendered by an immigration judge on May 10, 1974 which found the applicant excludable from the United States under section 212(a)(23) of the Immigration and Nationality Act and denied his application for a waiver of excludability under section 212(c) of the Act. The appeal will be dismissed.

The applicant, a 37-year-old married male alien, is a native and citizen of Mexico. He was admitted for permanent residence on June 6, 1962. In a sworn statement made on October 23, 1973 before an officer of the Immigration and Naturalization Service, the applicant stated that in approximately October 1967, he commenced living in Mexico while working in the United States. The applicant further stated that he resumed living and working in the United States in 1970.

The applicant was arrested at the International Border on April 3, 1972 for attempting to smuggle 41 kilos of marijuana into the United States. Pursuant to section 212(d)(5) of the Act, he was paroled into the United States for prosecution. On June 26, 1972, he was convicted of the offense of illegal importation of a controlled substance in violation of 21 U.S.C. 952, 960, 963 and of the illegal possession of a controlled substance with intent to distribute in violation of 21 U.S.C. 841(a)(1). The applicant was sentenced to imprisonment for a period of one year and one day.

At the applicant's exclusion hearing, the immigration judge found the applicant excludable under section 212(a)(23) of the Act. Section 212(a)(23) provides that:

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> > Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation,

> sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs.

We agree with the immigration judge that the applicant is excludable from the United States under section 212 (a)(23) of the Act.

The immigration judge denied the applicant's section 212(c) waiver of excludability application on the ground that the applicant was not statutorily eligible for that form of discretionary relief since he was not returning to an unrelinquished domicile of seven years. Furthermore, the immigration judge stated that even if the applicant were statutorily eligible for a section 212(c) waiver, he would deny the relief as a matter of administrative discretion. We agree with the immigration judge's decision that the applicant is not only statutorily ineligible for the benefit he seeks but he also is not deserving of a favorable exercise of discretion.

Section 212(c) provides that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven

> consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a). . . .

Although we concede that the applicant maintained his permanent resident status during the period he was commuting 1/ to the United States to work, from October 1967 to 1970, we cannot agree with his contention that he maintained, during that period, his domicile in this country.

The question of domicile is mainly a question of fact to be determined by analyzing numerous factors. In Garner v. Pearson, 374 F. Supp. 580, 589 (M.D. Fla. 1973), the court stated that:

> No one factor is controlling, but among the factors considered by the courts are: the place where political and civil rights are exercised, taxes paid, real and personal property located, driver's and other licenses obtained, location of club and church membership, and places of business or employment. See cases collected in Moore's Federal Practice, vol. 1, § 0.74(3.), fn. 20.

In Rosenstiel v. Rosenstiel, 368 F. Supp. 51 (S.D.N.Y. 1973), the court stated that in certain circumstances, the determination of domicile involves a comparison of the weight of the evidence, of the actual facts as to residence and defendant's real attitude and intention as disclosed by his entire course of conduct. In Matter of C-, 2 I&N Dec. 168, 170 (BIA 1944), we stated that "[i]n the final analysis, the issue in the case before us [question of domicile] is simply one of fact."

1/ Saxbe v. Bustos, 419 U.S. 65 (1974).

In Garner v. Pearson, supra at 590, the court stated that:

> Domicile is usually a matter of physical presence. When this physical presence is coupled with an intention of making it a home, change in domicile is instantaneous. Case v. Clarke, 5 Fed.Case 254, 5 Mason 70 (1828) (J. Story). Where, however, there is no true intent to make a place a permanent home, domicile cannot be said to lie there. Id. A court should not inquire into the motives for a change in domicile.

In the present case, the factual question which must be answered is whether the applicant not only physically resided in Mexico between 1967 and 1970, but also whether he had either the intention to make his home there indefinitely or the absence of an intention to make his home elsewhere, Gilbert v. David, 235 U.S. 561, 569-570; Gallagher v. Philadelphia Transportation Co., 185 F.2d 543, 546-547 (3 Cir. 1950); Stifel v. Hopkins, 477 F.2d 1116, 1121-1122 (6 Cir. 1973). In the applicant's own affidavit, dated October 23, 1973, he made the following statement:

> . . . I immigrated to the United States on 6/6/62 and resided in the United States until about October 1967 when I began living in Mexicali, Mexico and working in Calexico, California. My wife, Elia Montejano de Garcia, who immigrated to the United States in or about 1964, also moved to Mexicali with me. We lived there until 1970, when we moved to Hollister, California. . . .

Furthermore, on direct examination on March 5, 1974 before an immigration judge, the applicant admitted the truthfulness of his October 23, 1973 statement (Tr. p. 6).

Based on that testimony, it would appear clear that the applicant's domicile between 1967 and 1970 was Mexico. However, in applying for a waiver of excludability (Ex. 6) and in his testimony before the immigration judge at his exclusion hearing on May 10, 1974, the applicant maintained that he was only visiting relatives when he departed the United States for Mexico. He admitted that his visits were often rather lengthy, often for periods in excess of six months.

After analyzing all the factual circumstances surrounding the applicant's conduct during 1967-1970, we conclude that the applicant resided in Mexico between 1967 and 1970, he intended to remain there for an indefinite period of time, and he therefore abandoned his United States domicile and established a domicile in Mexico. Thus, the applicant cannot establish the requisite statutory period of unrelinquished United States domicile and he accordingly is not statutorily eligible for a waiver of excludability under section 212(c).

The immigration judge mentioned in his decision that "if the applicant were to have established eligibility, I would have denied his application as a matter of administrative discretion. . . ." We agree with that conclusion.

For the foregoing reason, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-4204

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

24th day of February 1977 she served/~~a copy~~ two copies of the within Petition for Rehearing with Suggestion for Rehearing En Banc

by placing the same in a properly postpaid franked envelope addressed:

Schiano & Wallenstein, Esquires
80 Wall Street
New York, New York 10005

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

24th day of February, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978